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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

MRS. ANNA L. GRAVES et al.,
Petitioners,
vs.
SPRINGFIELD GAS AND ELECTRIC COMPANY, a Corporation.

No. 194 .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

ROSCOE C. PATTERSON,
Landers Building,
Springfield, Missouri,
Attorney for Petitioners.

SAM M. WEAR,
WILLIAM A. WEAR,
ARCH A. JOHNSON,
WM. D. TATLOW,
Of Counsel for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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The said petitioners on behalf of themselves individually, and as a class, prays that a writ of certiorari issue to review the declaratory judgment of said Supreme Court, en banc, denying the preferred stockholders in the Springfield Gas and Electric Company a premium of $15.00 per share.

OPINION BELOW.

The opinion of the Supreme Court of Missouri, en banc (the highest court in the state) was rendered on the 9th day of May, 1949. It is not officially reported (Supplemental Transcript in this Court p. 164). So much of the

opinion as relates to the federal question involved is contained pp. 170-171, 172 of the transcript of the proceeding in the Mo. Supreme Court. The pages of the original transcript in the court below are hereafter referred to as O. Tr. and the pages in the supplemental transcript for this court are hereafter referred to as S. Tr.

JURISDICTION.

The judgment of the Supreme Court of Missouri, en banc (the highest court in the state) was entered on the 9th day of May, 1949. S. Tr. p. 164. The motion for rehearing was overruled on the 13th day of June, 1949. S. Tr. p. ....

The jurisdiction of this court is invoked under the provisions of Section 237 (b) 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925. Also Act of March 8, 1934, Title 28, Sec. 344 (b) Judicial Procedure.

The petitioners claim is based on the sale by the Federal Light and Traction Company of all of the common stock of the Springfield Gas and Electric Company to enable the Federal Light and Traction Company to comply with an order of the SEC Commission under the Public Utility Holding Company Act of 1935, resulting in the liquidation of the said Springfield Gas and Electric Company by applying thereto the charter provision of the Springfield Gas and Electric Company instead of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935, Title 15, Sec. 79k (b) (2), and denying to petitioners the title and right to $15.00 per share with interest specifically set up and claimed by the said petitioners under said Act. That the said Court has decided a federal question of substance not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED.

The parties involved are the Petitioners, who are the preferred stockholders as a class, the Federal Light and Traction Company, a holding company (hereinafter called Federal), who owned all of the common stock of the Springfield Gas and Electric Company (hereinafter called the Springfield Company), which company has been fully liquidated except as to the $15.00 per share, or $169,290, which is held for payment either to the preferred stockholders or to Federal, and the City of Springfield, Missouri a municipal corporation (hereinafter called the City), who makes no claim thereto.

The broad and controlling question in the case is whether the liquidation is governed by the charter provision of the Springfield Company so that Federal receives the $15.00 per share as a windfall, or whether it is governed and controlled by the Public Utility Holding Company Act so that the preferred stockholders will receive it.

The City under the Missouri Constitution and the decision of the Missouri Supreme Court in the Monday Case, which authorizes the City to enter into the Contract, Exhibit B, did not possess the capacity to subscribe for or become a stockholder in the Springfield Company so that the City bought the property of the Springfield Company and not its stock.

Does not the lack of capacity or power on the part of the City prevent the City from purchasing, or the Federal from selling its stock in the Springfield Company?

Is not Exhibit B, a single interrelated activity by which Federal was as firmly bound as the City, so the City could

not for the sole use and benefit of Federal use the charter provision of the Springfield Company to appropriate the $15.00 per share as a windfall to Federal?

Would not the legal effect have been the same if Federal under the order of the SEC Commission had itself dissolved the Springfield Company instead of contracting and requiring the City to do so for its sole use and benefit?

Does not Exhibit B (O. Tr. pp. 74-81) require the joint action of Federal and the City to dissolve and liquidate the Springfield Company?

Can Exhibit B be given the same legal effect as if the City had the capacity and means to purchase Federal's stock in the Springfield Company (and did so) so that Federal had no connection with the dissolution of the Springfield Company under its charter?

Or is the legal effect of Exhibit B the same as if the Federal had taken the necessary steps by stockholders' and directors' meetings to itself dissolve the Springfield Company and sold its property to the City?

Can the City use the charter provision of the Springfield Company to retire the preferred stock for the sole use and benefit of Federal and disregard the fact that it is stipulated that the Federal sold the stock of the Springfield Company by entering into the Contract, Exhibit B, to enable Federal to comply with the order of SEC in File No. 59-7?

The foregoing questions are so closely related as to constitute substantially the same question stated in a somewhat different form.

Can the instant case be distinguished from the case of Otis and Company v. SEC, 323 U. S. 624, as the Missouri

Supreme Court does, on the ground that it involved a plan under the Public Utility Holding Company Act?

If the Otis Case can be so distinguished, can the case of the North American Company v. SEC, 327 U. S. 686, be distinguished on the ground that it involved the review of orders of the SEC?

This too, although there was only one order in that case, which is identical with the order in the instant case with the sole exception of the dates and the names of the companies of which it was to divest itself of the ownership of the stock therein.

Is there any ambiguity, as the Missouri Supreme Court holds, in the second paragraph of Exhibit B (O. Tr., loc. cit. 75)?

Does it not require the retirement of the preferred stock at par, together with the applicable additional call price?

The last question is, if there is an ambiguity in Par. 2 of Exhibit B, does not Exhibit H, the Escrow Agreement (O. Tr. pp. 103-7, loc. cit. Pars. 2 and 3, p. 105), require the payment of the applicable additional call price to the preferred stockholders, for the reason that the Otis Case and the North American Company Case eliminates the payment of only the par value under the charter provision, and leaves only the applicable additional call price for the retirement of the preferred stock under Exhibit "H" and the Public Utility Holding Company Act.

STATEMENT.

The preferred stockholders have been paid the par value of their stock without waiving their right to receive a premium of $15.00 per share (Exhibit J, O. Tr. pp. 113-114).

The facts in the instant case are stipulated.

The charter provision, with reference to the redemption of the preferred stock, so far as applicable, contains the following:

> "At any time and from time to time, at the option of the Board of Directors, the Preferred Stock may be redeemed in whole or in part, on any date fixed for the payment of dividends on the Preferred Stock at the redemption price of One Hundred and Fifteen Dollars ($115.00) for each share of Preferred Stock redeemed," etc. (O. Tr., loc. cit. 46).

The liquidation provision in the event of dissolution so far as applicable, is as follows:

> "In the event of the dissolution, liquidation or winding up of the corporation, whether voluntary or involuntary, the holders of the Preferred Stock shall be entitled to be paid One Hundred Dollars ($100.00) per share, together with an amount equal to all dividends accrued thereon or in arrears (but without interest), before any amount shall be paid to the holders of the Common Stock and the holders of the Preferred Stock shall be entitled to no further payments or distribution. After such payment on the Preferred Stock the remaining assets shall be distributed pro rata among the holders of the Common Stock" (O. Tr., loc. cit. 48).

The order of the SEC is contained in Par. 15 (O. Tr., loc. cit. 55).

Under date of April 22, 1944, Federal entered into a contract with R. H. Teed of Hot Springs, Arkansas, providing, generally speaking, for sale of the fifty thousand (50,000) shares of the common stock of the Springfield Company to Teed subject to the conditions set forth in Exhibit A, par. 18 (O. Tr. p. 57).

The consideration recited in the Teed Contract, Exhibit A, for the stock is $650,000 (O. Tr. p. 65).

Par. 20 of the stipulation (O. Tr. p. 57), is as follows:

> "While said declaration or application for approval of said proposed sale to R. H. Teed was pending and undetermined, and under date of September 14, 1944, Federal and the City of Springfield, Missouri (hereinafter called 'the City'), executed and entered into a contract providing, generally speaking, for sale of the fifty thousand (50,000) shares of the common stock of the Springfield Company to the City, subject however to all of the terms, conditions and provisions of said contract, a true copy of which is hereto attached, identified as Exhibit 'B', and made a part of this stipulation by reference."

Par. 38 of the stipulation (O. Tr. p. 62), is as follows:

> "Federal sold the common stock of the Springfield Company to the City, in order to enable Federal to comply with the order of SEC in File No. 59-7, under date of August 17, 1943, hereinbefore quoted in paragraph 13 of this stipulation."

The sales and liquidation contract, Exhibit B (O. Tr. pp. 74 to 81), so far as applicable, omitting signatures, is as follows:

> "Agreement made this 14th day of September, 1944, between The City of Springfield, Missouri, and Federal

Light & Traction Company, a New York corporation (hereinafter called 'Federal').

"Witnesseth

"Whereas the City has offered to Federal the sum of Six Million Seven Hundred Fifty Thousand Dollars ($6,750,000) for the Springfield Gas and Electric Company, a Missouri corporation, with its properties as existing on July 31, 1944; and

"Whereas Federal has accepted said offer; and

"Whereas, it is desired to provide for the conditions which may arise pending the completion of such purchase and to make provision for the contingencies connected with said offer;

"Now, Therefore, It Is Agreed between the City and Federal as follows:

"First: The City shall take the necessary legal steps to authorize revenue bonds in at least the amount necessary to provide the purchase price as hereinafter specifically set forth. It is understood between the parties that a question has been raised as to the legal authority of the City to issue such revenue bonds for the purpose of carrying out this purchase, and the City agrees to take promptly in the courts of Missouri all reasonable steps as advised by its attorneys for the purpose of securing a declaratory or other proper judgment so that if such decision shall be favorable the said bonds may be sold. To the extent that the City may request it, Federal, through Springfield attorneys, whose fees shall be paid by Federal, will give its cooperation in presenting the matter to the courts for decision. Upon securing such favorable decision, the City agrees to take the proper steps to issue and sell promptly such revenue bonds in the amounts necessary to pay said purchase price.

"The City shall give to Federal five days' notice of a selected closing date, on which date, against payment therefor by the City of the Purchase price of $6,750,000 New York funds, the appropriate securities shall be delivered to the City or its representative.

"Second: It is understood that the balance sheet of Springfield Gas and Electric Company, attached hereto as Exhibit A, shows the assets and liabilities of said Company as of said July 31, 1944. At the time of closing there shall be deducted from such purchase price of $6,750,000 an amount equal to the preferred stock then outstanding and the first mortgage bonds then outstanding at the par or principal amounts thereof, respectively, together with the then applicable additional call prices unless prior thereto an order shall have been made by a competent authority permitting or requiring redemption of such securities or a part thereof without the payment of a premium in which latter case the deduction shall be in an amount in accordance with such order. There shall also be deducted from such purchase price all other items of expense incident to calling and retiring such preferred stock and such first mortgage bonds, including all accrued dividends and interest, cost of publishing any call notices that may be required and trustees' fees." • • •

"Third: At the time of closing there shall be paid by Springfield Company to Federal all federal income tax and excess profit taxes as accrued on the books of the Springfield Company at the date of the last closing of said books." • • •

"Eighth: It is agreed between the parties hereto that this contract shall become null and void, unless extended by the consent of both of the parties hereto,

unless the City of Springfield shall have secured the funds and set the date for closing prior to December 1, 1944."

"Ninth: This contract is subject to the securing of the approval thereto of any federal or state bodies having jurisdiction thereover."

"Tenth: At the time of closing all of the 50,000 shares of common stock of the Springfield Company shall be delivered, together with the resignations of all officers and directors of the Springfield Company, and in the interim no changes detrimental to the interests of the Springfield Company shall be made in any contracts or agreements regarding its services" * * * (Exhibit B, O. Tr. pp. 74-81).

Section 6 of Article IX of the Constitution of Missouri of 1875 provides, so far as applicable, as follows:

"Sec. 6. Municipalities not to subscribe to capital stock nor aid corporations or institutions.—No county, township, city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning or other institution, whether created for or to be controlled by the State or others."

The Supreme Court of Missouri construed the constitutional provision, supra, in holding that the City had the power to purchase the property but not the stock.

Springfield Gas & Electric Company v. Monday, 353 Mo. 981, loc. cit. 992, par. 5.

"Respondents further contend that the City cannot purchase the common stock of Gas & Electric, citing

Section 6, Article 9, of the Constitution, prohibiting a city from becoming a subscriber to the capital stock of any corporation. However, it is clear that the City is not subscribing to the stock of Gas & Electric and becoming a part owner therein, but has contracted with Federal to buy all of its stock in order to become the owner of its physical utility properties and is purchasing this stock solely to acquire them. The ordinance provided for the immediate dissolution of Gas and Electric and is using this means of acquiring its properties because it can do so at much less cost in this way." * * *

Paragraph 15 of the stipulation (O. Tr. pp. 54 and 55) is as follows:

"In the Matter of Cities Service Power & Light Company and its Subsidiary Companies, Respondents, File No. 59-7, a proceeding instituted to bring about compliance with the provisions of Section 11 (b) (1) of the Holding Company Act, the Securities and Exchange Commission (hereinafter called 'SEC') handed down its findings, opinion and order on or about August 17, 1943. SEC then ordered, among other things:

"It Is Ordered that Federal Light and Traction Company shall sever its relationship with the companies named hereafter by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules and Regulations promulgated thereunder, of its direct and indirect ownership, control and holding of securities issued and properties owned, controlled or operated by the following companies:

Springfield Gas and Electric Company (and other companies named)."

The order in North American v. Securities & Exchange Commission, 327 U. S. 686, 709, is Release No. 3405, and is as follows:

> It Is Ordered, pursuant to Section 11 (b) (1): 1. That The North American Company, a registered public utility holding company, shall sever its relationship with the companies named hereafter by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules and Regulations promulgated thereunder, of its direct and indirect ownership, control and holding of securities issued and properties owned, controlled or operated by the following companies: (naming them)."

Plaintiff filed in the trial court a motion to dismiss defendants' counterclaim and alleged in Paragraph 3 the following ground therefor:

> "* * * that neither plaintiff nor the city now has or claims any beneficial interest in the fund and that no portion of the fund could in any event, be payable or paid to either plaintiff or the city."

SPECIFICATIONS OF ERRORS TO BE URGED.

The Supreme Court of Missouri erred:

1. In Holding that the Federal sold only the stock in the Springfield Company and not its property. Exhibit B, pp. 74-81.

2. In Holding that the Otis Case is distinguishable from the instant case because it involved a plan, and the North American Company Case because it "involved the review of orders of SEC."

3. In Holding that Par. 2 of Exhibit B, is ambiguous and does not provide for the retirement of the preferred stock at par, and the applicable call price.

4. In Holding that the preferred stockholders are not entitled to $115.00 per share under the Escrow Agreement, Exhibit H, O. Tr. p. 103-107.

REASONS FOR GRANTING THE WRIT.

The Missouri Supreme Court in the instant case has decided a federal question of substance not in accord with the applicable decisions of this Court. It has denied the preferred stockholders the call price of $115.00 per share, as provided in Exhibit B which is controlled by the Public Utility Holding Company Act of 1935, and not by the charter provision of the Springfield Company that was issued in 1927. That the stockholders at the time the charter was issued could not and did not have in mind the Public Utility Holding Company Act. That the question involved is a federal question of importance and the error of the court below should be corrected by this Court in the public interest.

> "The applicability of the charter provision under the Public Utility Holding Company Act of 1935 is a matter of federal law." Otis & Co. v. SEC, 323 U. S., loc. cit. 636.

1. Exhibit B.

There is no ambiguity in Exhibit B as to what the Federal sold and the City purchased. The Federal sold the property of the Springfield Company and not merely its stock. By the preamble of the Exhibit the City makes an offer to Federal to buy the property of Springfield for $6,750,000. The Federal accepts the offer. The considera-

tion of $6,750,000 is the consideration paid for the property and not the stock. The first paragraph requires the City to take the necessary steps to authorize the issuance of revenue bonds to provide the purchase price of the property and not the stock. The revenue bonds could be issued only against the income from the property and not the stock. It recites that the legal authority of the City to do so is doubtful. The Federal tenders the services of its attorneys to get the question settled by the Missouri courts. It provides for the payment by the City of the purchase price of $6,750,000 in New York Funds. The second paragraph provides for the deduction from the purchase price of an amount equal to the preferred stock then outstanding and the first mortage bonds then outstanding at par or principal amounts thereof, respectively, together with the applicable additional call prices unless prior thereto an order shall have been made by a competent authority permitting or requiring redemption of such securities or a part thereof without the payment of a premium. The eighth paragraph provides that the contract shall become null and void unless the City shall have secured the funds to enable it to purchase the property and not merely the stock. The tenth paragraph provides for the delivery of 50,000 shares of stock together with the resignations of all officers and directors of the Springfield Company, and that in the interim no changes detrimental to the interest of the Springfield Company shall be made in any contracts or agreements for their services. This clearly shows that the parties were dealing with the property and not merely the stock. It further shows that the Federal was an active participant and not merely selling the common stock in the Springfield Company, and wiping its hands of the transaction, so that it would be in no way connected with or a party to the dissolution and winding up of the Springfield Company. This Contract, Exhibit B, can bear no other construction, and the decisions of the Missouri Su-

preme Court that "Federal was enabled to comply with SEC's order by selling the stock to the City," entirely disregards the plain and unambiguous provisions of the contract and its legal effect. Exhibit B cannot be given the same legal effect as if Federal had sold its stock to the City, received the purchase price and had no connection whatever with the City's act in dissolving and liquidating the corporation. Under such state of facts Federal's only relation to the dissolution and liquidation would be that of a former stockholder. This is the legal effect of the decision of the Missouri Supreme Court in the instant case. The legal effect of Exhibit B is the same as if the Federal had itself dissolved and ilquidated the corporation and then sold the property to the City and used the charter provision to retire the preferred stock at par. It is certainly of no importance whether the City or the Federal took the necessary steps by stockholders' and directors' meetings to accomplish the dissolution and liquidation of the corporation. It was done for the joint benefit of both the City and Federal; to enable the City to acquire the property and not the stock; to enable the Federal to receive a much larger amount for its stock than it would have received if there was no dissolution, or about twice what it was willing to sell its stock to Teed for. It was done under and pursuant to the order of the Public Utility Holding Company Act of 1935, as stipulated in Paragraphs 20, O. Tr. p. 57 and 38, O. Tr. p. 62.

Exhibit B constitutes a single interrelated activity of both the City and Federal. So far as the question of whether the preferred stockholders shall receive only par under the Springfield Company's charter provision, or $115.00 per share under the Public Utility Holding Company Act of 1935 is concerned only Federal is interested in it. Neither the Springfield Company nor the City have a penny's interest in it. A very similar question was decided by this Court May 2, 1949—United

States v. Urbuteit, 335 U. S. ...., 67 S. Ct. Advance Sheet No. 14, p. 840.

2. The case of Otis & Company v. SEC, 323 U. S. 624, 650, cannot be distinguished from the instant case, as the Missouri Supreme Court attempts to do. The Otis Case announces two fundamental principles of law. First, that there is a plain distinction between a dissolution under the company's charter, whether voluntary or involuntary, and a dissolution and liquidation under the Public Utility Holding Company Act of 1935. Second, in proceeding under the Public Utility Holding Company Act of 1935, the securities of the dissolved and liquidated company can neither be increased nor diminished, which is the equivalent of holding in the instant case that the preferred stock whose value exceeds par cannot be retired at par under a charter provision providing for a dissolution and liquidation of the corporation.

The reasons assigned by the Court why the charter provision did not apply:

> "The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights. The exercise of legislative power by Congress through Section 11 (b) (2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the liquidation of the corporation, whether voluntary or involuntary envisaged by the charter provisions of Power for preference to the senior stock." 323 U. S., loc. cit. 631.

The fact that in the instant case the SEC did not order a liquidation of the Springfield Company but only a sale by Federal of the stock of the Springfield Company does not

distinguish it. If Federal had merely sold the stock of Springfield there would have been no dissolution either under the charter or the Public Utility Holding Company Act. Federal did not merely sell the stock but pretended to do so when in fact it sold the property of Springfield to the City under the order of the SEC, and is undertaking to use the charter provision to retire the preferred stock under the charter provision that has no application. It is directly held in that case that the selection by the commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights. On exactly the same principle the selection by Federal to sell the property and seek to use the charter provision to retire the preferred stock at less than its value, is as clearly contrary to the public policy of the Public Utility Holding Company Act as if it involved a dissolution under a plan. It results in a liquidation under the company's charter which is entirely distinct from the liquidation of the corporation under the Public Utility Holding Company Act of 1935. It results in the confiscation of $15.00 per share, which the preferred stockholders are entitled to under a dissolution to comply with the order of SEC under the Public Utility Holding Company Act, and in a windfall to Federal. Such a holding violates both of the fundamental principles announced in the Otis Case.

It is further said in that case:

> "We think, however, the charter provision is inoperative in simplification under Sec. 11 (b) (2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a simplification under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated liquidation within the meaning of Power's charter provision.

Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question" (loc. cit. 637, 638).

This is a distinct holding that Springfield's charter provision does not apply in the instant case. If Federal had merely sold the stock it owned in the Springfield Company it would not have run afoul of the dissolution and liquidation under the Public Utility Holding Company Act, but having sold not the stock but the property of the Springfield Company, the overriding policy required Federal to resort to the liquidation contract and pay the preferred stockholders the call price of $115.00 per share. Federal was prohibited from resorting to the charter provision that has no application to obtain a windfall of $15.00 per share. It could only acquire title to the property by a dissolution of the Springfield Company in order to convey it to the City. The dissolution had to be under the Public Utility Holding Company Act and not under the charter of the Springfield Company which has no application.

The Otis Case also emphasizes that values of the securities under a liquidation under the Public Utility Holding Company Act can neither be increased nor decreased.

It says:

"Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve

values to investors, not to destroy them" (323 U. S. 624, loc. cit. foot p. 634).

The Otis Case further says:

> "The reason does not lie in the fact that the business of power continues in another form. This is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens" (323 U. S. 638).

This is a direct holding that the Otis Case applies where the Commission merely ordered a divesture of the stock owned by the Federal, and the Federal resorted to a liquidation of the Springfield Company and sold its property to the City for substantially double the amount that Federal was willing to sell the stock to Teed.

The case also calls attention to the fact that the "going concern" rule applies (323 U. S. 635). That when the President recommended the passage of the act he said: "that the pending holding company bill would not destroy legitimate business or wholesome and productive investment. It would not destroy a penny of actual value of those operating properties which holding companies now control and which holding company securities represent insofar as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor" (323 U. S., loc. cit. 636).

The Otis Case points out very clearly that the Public Utility Holding Company Act of 1935 deals primarily with

the voting power of the corporation involved. That in the simplification of a corporation's voting power it deals only incidentally with the value of the securities involved without increasing or decreasing the value thereof.

The case of the North American Company v. The Securities and Exchange Commission, 327 U. S. 686, loc. cit. 709, 90 L. Ed. 645, l. c. 961, cannot be distinguished from the instant case. The order in the instant case is set forth in Par. 15 (O. Tr. p. 55). Also in statement, supra. The order in the North American Company Case is Release No. 3405, and is set forth in the statement, supra. The orders are identical with the exception of the names of the companies and the dates involved. The only function that the SEC was required to perform in the North American Company Case was to determine the qualifications of the purchasers of the stock sold under the order.

In the instant case the SEC Commission had no duty to perform after it made the order of disposition, for the reason that the City as a municipality was exempted from the Act. It possessed the capacity to purchase the property without the approval of the SEC. The City did not possess the capacity to purchase the stock as it could only do so to acquire title to the property. Neither the Commission nor the Public Utility Holding Company Act could confer the power upon the City to purchase the stock. Hence the Federal could not and did not sell the stock as such to the City. Of course if the City had possessed the capacity to purchase the stock from Federal and had done so, the fact that the City had thereafter dissolved and liquidated the corporation would not bring Federal back into the transaction so that the liquidation would be governed by the Public Utility Holding Company Act. The Missouri Court holds that the City was enabled to comply with SEC's order by selling the stock to the City. This holding disregards and ignores the plain provisions

of Exhibit B. It also disregards and ignores the entire reasoning of this Court in the Otis Case, and is in direct conflict with the North American Company Case. That the case directly holds that an order of the SEC that requires dumping, that materially affects the values of the securities sold, would be involved under the Public Utility Holding Company Act. On the same principle, to permit the Federal to use the charter provisions that has no application so as to retire the preferred stock at less than its value, would likewise be unlawful.

The Missouri Court, after erroneously holding that the city purchased the stock instead of the property, evidently realized that such holding is not justified, and then seeks to distinguish the Otis Case on the ground that the SEC had no jurisdiction to pass on a declaration or application for approval of the Contract, Exhibit B. This ignores the fact that it is the Public Utility Holding Company Act that governs whether the liquidation is under it, and not the order of the SEC. Neither can the Otis Case be distinguished for lack of a plan and certainly the North American Company Case cannot be so distinguished, as there was in fact no plan in that case.

No question of jurisdiction was involved in either case. Neither is there any question of jurisdiction involved in the instant case. The SEC had jurisdiction to make the order that it did make. It is stipulated that Exhibit B was made to carry out the order of the SEC, Par. 20 (O. Tr. p. 57), and Par. 38 (O. Tr. p. 62). The Federal sold the property and not the stock. It could only acquire the property by liquidation of the Springfield Company. The liquidation had to be under the Public Utility Holding Company Act to carry out the order of SEC, and could not be under the charter provision, as is directly held by both the Otis and North American Company cases.

3. The second paragraph of Exhibit B is copied in full in O. Tr. pp. 75 and 76, and also in the statement, supra, p. 6.

It contains the following:

> "At the time of closing there shall be deducted from such purchase price of $6,750,000 an amount equal to the preferred stock then outstanding and the first mortgage bonds then outstanding at the par or principal amounts thereof respectively, together with the then applicable additional call price unless prior thereto an order shall have been made by a competent authority permitting or requiring redemption of such securities or a part thereof without the payment of a premium in which latter case the deduction shall be in an amount in accordance with such order." * * *

No order was made.

By its express terms the transaction was to be completed at the time of closing.

The word "deducted" in the context in which it is here used means **paid** out of the purchase price. The context uses the words, permitting or requiring **redemption** of such securities, which certainly means the **payment** of such securities. It also contains the words, **payment of a premium.**

The terms used apply both to the mortgaged indebtedness and the preferred stock.

There is no suggestion that the payment to retire the preferred stock is to be the par value on the closing date, and the applicable additional call price at some indefinite future date, and subject to an entirely different condition.

By the terms of this paragraph **time** is of its essence, and by the terms of the entire Contract, Exhibit B, the

closing date is of its essence, as the City could only pay for the stock by acquiring title to the property, so as to issue and sell revenue bonds payable out of the income derived from the property.

The third paragraph of the contract also refers to what shall be paid at the time of closing. Hence it is plain that the word "**deducted**" in the context in which it is used, with reference to the "**redemption and payment of the securities,**" can have no other meaning than, that the "deduction" is made for the purpose of paying the amount deducted, and not to create a trust fund, as Exhibit H, the Escrow Agreement, seeks to do for future litigation between Federal and the preferred stockholders.

In the concluding part of the opinion in the instant case the court below holds that Federal had the right to have included in the Contract the terms of Exhibit H, the Escrow Agreement, and as it would have more efficiently protected the right of the Federal that was what they were trying to do when they wrote the second paragraph of Exhibit B, supra. This, too, although the second paragraph of Exhibit B contains no such provision, but an entirely different obligation. Paragraph 2, Exhibit B, shows on its face that up to the date of closing that Federal was willing to retire the preferred stock at par and the additional call price of $15.00 per share. The second paragraph of Exhibit B is the obligation and contract which the Supreme Court in the Monday Case (holding that the City had the capacity to purchase the property but not the stock) approved. It shows that Federal up to the closing date was willing to pay the call price. After the contract was approved, the bonds sold, and the $6,750,000 received by the City, it then occurred to Federal to change the obligation to retire the preferred stock at the call price by creating the Escrow Agreement, Exhibit H. It attempted to do so by disregarding the time provision which is of the essence

of the contract so as to give Federal a "windfall" of $15.00 per share. The court in the instant case, instead of enforcing the contract the parties made, has made a new contract for them which it thinks the parties should have made.

It is important to keep in mind that neither the City nor the liquidated Springfield Company has any pecuniary interest in the $15.00 per share. This is shown by the motion to dismiss the counterclaim, by Exhibit B and the Escrow Agreement, Exhibit H. The $15.00 per share goes either to Federal or the preferred stockholders.

4. Exhibit H, the Escrow Agreement, in Paragraph 2 (O. Tr. p. 105), provides:

> "In the event that a court having jurisdiction shall make a final determination on or before March 26, 1947 that a premium of $15.00 per share is payable to the preferred stockholders of Springfield * * * The escrow agent unless otherwise ordered by said court shall immediately pay over to a liquidating agent, which shall be Industrial Trust Company of Providence, Rhode Island if it be willing to Act" * * * (O. Tr. p. 105).

Par. 3 (O. Tr. p. 105) is as follows:

> "In the event that a court having jurisdiction shall make a final determination at any time prior to March 26, 1947 that no premium is payable to said preferred stockholders the escrow agent shall forthwith pay to Federal said sum of $169,290." (There is a provision for extending the date.) (O. Tr. p. 105.)

Under this Escrow Agreement, either the preferred stockholders are to be paid a premium of $15.00 per share, or the Federal is to be paid $169,290 under the charter

provision for the liquidation of the preferred stock at par. The decisions in the Otis Case and the North American Company Case, discussed in Paragraph 2, supra, directly held that the Federal cannot be paid the $169,290, or $15.00 per share under the charter provision. This leaves only the provision for the payment of $15.00 per share to the preferred stockholders under the dissolution and liquidation contract, Exhibit H, the Escrow Agreement, and the Public Utility Holding Company Act of 1935. In other words, even if there is an ambiguity in the second paragraph of Exhibit B, which the lower court thought it discovered, the $15.00 per share is still due and payable to the preferred stockholders under the decisions of this Court, supra.

The reason assigned by this Court in the cases, supra, that the charter provision does not apply, is that the Public Utility Holding Company Act could not have been in the mind of the parties in 1927 when the charter was issued. The Escrow Agreement was in the mind of the parties and made for the express purpose of seeking to change Paragraph 2 of Exhibit B so that Federal instead of the preferred stockholders will receive the $15.00 per share.

On June 27, 1949, since the opinion by the Supreme Court of Missouri, this Court has exhaustively reconsidered the Public Utility Holding Company Act and the Otis Case. It involved the reorganization of the Engineers Public Service Co. The title is—S. E. C. v. Central Illinois Corp., not yet reported in the Advance Sheets. The case considers and decides a number of questions not involved in the instant case. It decided one question, which is equally applicable to the instant case. The manifest solvency of the liquidated corporation in that case, as well as the Otis Case and the instant case, simplifies the problem of the stockholders' rights.

It also holds:

> "When it became apparent the going-concern value would exceed the call prices of the stocks by a considerable amount, the exact going-concern value became immaterial, because the call price, at which the corporation could always retire the preferred without reference to the Act, marked the limits of the preferreds' claims."

So that as a matter of law the preferred stockholders became entitled to the call price. The only difference between that case and the instant case is, that in the instant case on account of the death of the Court Reporter the oral testimony taken in the trial court was omitted by agreement of counsel for the plaintiff and defendants as being immaterial, irrevelant and unnecessary on the appeal (O. Tr. p. 129).

In that case the rights of the preferred stockholders to the call price is based on the fact that the preferred stockholders there, as in the instant case, were to be paid for their stock in cash, and not in securities of equal value, and was based upon a finding of the S. E. C. Commission, which neither the District Court nor the Court of Appeals could set aside or modify. In the instant case the stockholders' rights are not based on a finding of the Commission but upon the liquidation agreement, which the Federal entered into so that it could receive a much larger amount for its common stock than it was willing to sell the stock to Teed for. The preferred stockholders in the instant case are entitled as a matter of law to the call price, both under Section 2 of Exhibit B (O. Tr. p. 74), as well as under the Escrow Agreement, Exhibit H (O. Tr. p. 105). Hence for the same reason that, in that case the exact going-concern value became immaterial, it is equally immaterial in the instant case whether the investment value

of the preferred stock is in fact less or exceeds the call price. The call price controls in the instant case, not because of the charter provision that was promulgated in 1927, but by reason of the fact that the liquidation contract adopts the call price as the value of the stock, both under Section 2 of Exhibit B, and the Escrow Agreement, Exhibit H (O. Tr. p. 105).

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROSCOE C. PATTERSON,
Landers Building,
Springfield, Missouri,
Attorney for Petitioners.

SAM M. WEAR,
WILLIAM A. WEAR,
ARCH A. JOHNSON,
WM. D. TATLOW,
Of Counsel for Petitioners.